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Supreme Court of the United States

October Term, 1965

No. 866

NECCHI SEWING MACHINE SALES CORP.,

Petitioner,

against

NECCHI S.p.A.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID A. BOTWINIK,
Attorney for Respondent,
63 Wall Street,
New York City.

FINK & PAVIA,
MURRAY MOGEL,
of Counsel.

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The petition for certiorari in this case requests this Court to review that portion of a decision in this case by the Court of Appeals for the Second Circuit rendered on July 13, 1965, 348 Fed. 2d 693 (Pet. Supp. 26-34)* which reversed in part an unreported order of the United States District Court for the Southern District of New York (Pet. Supp. 22-23).

The issues presented to the Court of Appeals were (1) whether the judicial or arbitral tribunal has the exclusive power to determine questions of substantive arbitrability, and (2) whether the items tendered to arbitration by petitioner were arbitrable under the terms of the agreement between petitioner and respondent. In essence, the Court of Appeals determined that the Court below could not

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* Numerals in parentheses preceded by "Pet. Supp." refer to supplementary pages in petitioner's brief; when preceded by "Pet. App." refer to appendix to petitioner's brief in the Court of Appeals; and when preceded by "Resp. App." refer to the Appendix pages of this brief.

delegate to arbitrators the exercise of the exclusive judicial power to determine the question of the substantive arbitrability of certain items tendered to arbitration by petitioner pursuant to a limited agreement to arbitrate. Such reversal was in conformity with the decisions of this Court which established as axiomatic the proposition that:

> "... whether or not the company was bound to arbitrate, as well as what issues it must arbitrate is a matter to be determined by the court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 237, 241 (1962).

Accord, e.g. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1964); *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964).

Those issues of arbitrability must be viewed in the context of certain controversies between petitioner and respondent which arose subsequent to the expiration of a certain distributorship agreement between them. From 1948 until December 31, 1963, the petitioner was the exclusive distributor for the territory of the United States of America of sewing machines manufactured by the respondent. During that period, the relationship between the petitioner and respondent was governed by written distributorship agreements which were entered into at various times. Prior to 1961, none of those agreements contained an arbitration provision. On July 18, 1961, the parties entered into an agreement which contained the following language (Pet. Supp. 1-8):

> "m) All matters, disputes or disagreements arising out of or in connection with this Agreement shall be finally settled by three (3) Arbitrators appointed as follows: Each party shall appoint an Arbitrator, and the two thus selected shall designate a third. If either of the parties shall fail to appoint its Arbitrator within thirty (30) days after receipt of notice of the appointment by the other party of its Arbitrator, or if the two Arbitrators so appointed

> shall fail to appoint the third within a period of thirty (30) days, then the Chief Judge of the District Court of the United States of America for the Southern District of New York shall have the power at the request of either party and after ten (10) days' notice from the requesting party to the other party to make the appointment(s) not made as contemplated above. . . .'' (Pet. Supp. 8)

On January 18, 1962, the effective period of the July 18, 1961 agreement, which was to expire December 31, 1962, was extended for an additional year (Pet. Supp. 11-17). The extended agreement was not renewed and the term of the exclusive distributorship granted by respondent to petitioner expired December 31, 1963.

Subsequent to the expiration of the written agreement, difficulties arose between the petitioner and the respondent. During January and March, 1964, petitioner indicated that it wished to submit certain wholly unspecified items to arbitration. However, petitioner did not attempt to specify those items until May 22, 1964, when it sent a letter to respondent in which it set forth the items it wished to submit to arbitration and designated its arbitrator (Pet. Supp. 19-21). Respondent was then to designate its arbitrator by June 22, 1964, pursuant to the agreement.

Respondent did not designate an arbitrator because of its belief that petitioner's demand for arbitration included items which were not arbitrable under the agreement between the parties. On June 22, 1964, instead of designating an arbitrator, respondent commenced an action for declaratory judgment in an attempt to determine whether the items tendered for arbitration by the petitioner were, in fact, arbitrable. On the same day, respondent served a notice petition to the Chief Judge of the United States District Court for the Southern District of New York requesting that he appoint an arbitrator for the respondent (Pet. App. 1b.-15b.). Respondent cross-moved in the proceeding

brought by the petitioner and requested relief prayed for in its action for declaratory judgment. On September 10, 1964, Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York dismissed without prejudice respondent's action for declaratory judgment, ordered respondent to appoint an arbitrator, and further ordered the parties to proceed to arbitration (Pet. Supp. 22-23). Chief Judge Ryan rejected respondent's objections to the arbitrability of the items tendered to arbitration by the petitioner stating that it was not the function of the Court to determine questions of substantive arbitrability for the following reason:

> "Whether or not these matters 'arise out of' or are 'in connection with' the agreement of July 18, 1961, we do not now finally determine; nor is it necessary for us to do so. The broad scope of the arbitration provision precludes us from preliminary inquiry as to whether the nine listed items arise 'out of or in connection with the agreement' (*Matter of Exercycle Corp.* 9 N. Y. 2d 334, 335)." (Pet. Supp. 22-23).

Respondent appealed to the United States Court of Appeals for the Second Circuit on the crucial question of whether the judicial or arbitral tribunal had the exclusive power to determine questions of substantive arbitrability. The Court of Appeals reversed the order of Chief Judge Ryan. In holding that Judge Ryan should have determined the issue of the arbitrability of the items tendered to arbitration by petitioner, the Court of Appeals said, in part:

> "The basic flaw in the order compelling Necchi to arbitrate stems from the approach of the District Court. The Court declined to decide whether the nine items listed in the Sales Corp's letter were 'matters, disputes or disagreements arising out of or in connection with' the agreement. Instead the court took the position that this decision was to be made by the arbitrators, reasoning that 'the broad scope of the arbitration provisions precludes us from

> (making the) preliminary inquiry as to whether the nine listed items arise "out of or in connection with the agreement." ' This was error, and quite clearly so. An order under the Federal Arbitration Act compelling a party to arbitrate is simply an order granting specific performance of an arbitration provision, *Kulukundis Shipping Co., S/A* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 986 (2d Cir. 1942), and a court must interpret the provision to determine whether it requires arbitration on certain items prior to granting such relief. The court must decide whether the parties had agreed to submit the particular disputes to arbitration. Neither the federal policy in favor of arbitration nor the ostensible broad reach of the arbitration provision in question relieves the District Court of judicial responsibility of determining the question of arbitrability, unless the arbitration provision is so unusually broad that it clearly vests the arbitrators with the power to resolve questions of arbitrability as well as the merits, see *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 583 n. 7 (1963). The arbitration provision here is broad, but not that broad." (Pet. Supp. 28-29).

Having established that the Court had the exclusive power to determine the issue of substantive arbitrability, the Court of Appeals elected to determine the specific issues of arbitrability in the instant case rather than remanding those issues to the District Court for determination. It set forth as its reasons for so electing the following:

> " . . . the question of arbitrability seems so clear that no useful purpose would be served by leaving the question to be resolved by the District Court upon further proceedings, and in order to expedite this litigation, we will rule on the arbitrability of each of the items. Cf. *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 (2d Cir.), aff'd., 376 U. S. 543 (1964)." (Pet. Supp. 30).

The Court then proceeded to examine each item tendered to arbitration by petitioner in its demand dated May 22,

1964. It found that all but two of the items contained therein were not arbitrable. In reaching its decision as to each of the items, the Court of Appeals applied principles of law which have been repeatedly and consistently applied by both this Court and the courts of the State of New York. Despite petitioner's attempt to manufacture a spurious issue by claiming a conflict between Federal and State law, analysis of State and Federal law reveals complete agreement upon the principles that a court alone can determine issues of substantive arbitrability. Since the Court of Appeals had determined the issues of arbitrability, it affirmed Judge Ryan's dismissal of respondent's action for declaratory judgment seeking the same relief.

Petitioner applied to the United States Court of Appeals for the Second Circuit for a rehearing. Petitioner's application for a rehearing was denied. This denial was not only by the panel of judges who heard the argument, but by the entire Court.[1] (Resp. App. 15)

After obtaining an extension of time within which to file its petition for certiorari from Mr. Justice Harlan of this Court, petitioner served its petition on respondent on December 30, 1965, and filed the petition on December 31, 1965. Notice of filing of the petition for certiorari was served upon respondent on January 13, 1966.

POINT I

No conflict exists between the Federal and State law, nor is there any other reason which would warrant the grant of Certiorari in this case.

In conformity with the decisions of this Court, the Court of Appeals in the instant case held that the Court

[1] The petitioner has failed to include in its supplement a copy of the order denying its request that the case be reheard in banc. A copy of the order is set forth as Appendix 1 at page 15 hereof.

alone was the proper tribunal to determine the preliminary questions of whether the items tendered to arbitration by petitioner come with the scope of the agreement to arbitrate entered into by petitioner and respondent. This holding is merely an application of the law expounded and consistently applied by this Court that the determination of issues of substantive arbitrability is solely a judicial function. See e.g. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1963); *John Wiley & Sons* v. *Livingston*, 373 U. S. 543 (1964).

Despite the consistency of the decision of the Court of Appeals with the decisions of this Court, and despite the conformity of the federal and state decisions in this area, petitioner has resorted to the desperate invention of a nonexistent distinction between federal law and New York State law upon which to base its petition for a writ of certiorari. Petitioner's lengthy and tortuous argument may be reduced to the following propositions: (1) Had New York law rather than federal law been applied by the Court of Appeals, it would have affirmed the District Court's holding that the determination of the question of substantive arbitrability was for the arbitrators rather than the Court; (2) This Court has not yet determined whether state or federal law is applicable to actions brought under § 4 and § 5 of the Federal Arbitration Act, and that such a determination was a matter of interest to this Court because of its grant of certiorari in *Robert Lawrence Co.* v. *Devonshire Fabrics Inc.*, 271 F. 2d 402 (2d Cir. 1959), cert. granted 362 U. S. 909 (1960), cert. dismissed 364 U. S. 801, (1960); and (3) Certiorari should be granted in this case to determine the questions raised in the *Lawrence* case, *supra*, which were never determined because the petition therein was dismissed.

Petitioner's argument does not support its conclusion that New York law differs from federal law regarding the appropriate forum for the determination of questions of substantive arbitrability. In fact, the petitioner never

raised the issue of conflict between federal and state law until it submitted its petition for rehearing to the Court of Appeals. In its brief for a rehearing, petitioner also failed to demonstrate that there was any such conflict. It is also noteworthy that the Court of Appeals in its decision makes no mention of any conflict between federal and state law. An examination of petitioner's brief in the instant proceedings reveals that it has not cited a single New York case which supports its position. Rather it relies upon general language from completely inapposite cases. Analysis of the decisions of the Court of Appeals of the State of New York reveals that petitioner's failure to cite any precedent was inevitable: the New York law is clearly in accord with the federal law.

The general principles delineated by Mr. Justice Cardozo in *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929) continue to determine the scope of jurisdiction and allocation of function between judicial and arbitral tribunals. Mr. Justice Cardozo formulated the test of arbitrability to be applied to items tendered to arbitration thusly:

> "The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness." at page 299.

Those principles have been consistently applied by the Court of Appeals of the State of New York. The recent Court of Appeals decision, *Matter of Exercycle Corp.*, 9 N. Y. 2d 329 (1961), cited by the District Court in support of its decision, but which was notably omitted from the brief of the petitioner herein, reaffirmed and demonstrated the

vitality of the principles and test of arbitrability formulated by Mr. Justice Cardozo. That case dealt with an employment contract containing an arbitration clause. The employer sought to stay arbitration pending the determination by the Court that the container contract was unenforceable because of lack of mutuality. The Court held that in such a case it was for the arbitrators to determine the validity of the contract containing the arbitration clause. To restrict the holding and negative the inference erroneously drawn in this case by the District Court below, the Court of Appeals of the State of New York in *Exercycle, supra,* stated:

> "It has long been this state's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and *is within the compass of the provisions must go to arbitration.*" (Emphasis added), at p. 334.

Any misunderstanding about the clear intent of the Court of Appeals in the *Exercycle* case is laid to rest in a subsequent case, *Matter of Carey* (*Westinghouse Electric Co.*), 11 N. Y. 2d 452 (1962), where the Court of Appeals cited and applied a principle enunciated by this Court:

> '" . . . a court must always inquire, when a party wants to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute" (United Steelworkers v. American Mfg. Co., supra, 363 U. S. pp. 570-571 . . .).' at page 456.

See also *Lafayette Iron Works* v. *Wilaka Construction Co.*, 23 A. D. 2d 487, App. Div., 1st Dept. (1965); *A-1 Camp Chair Service Co.* v. *William L. Crow Construction Co.*, 24 A. D. 2d 623, App. Div., 2d Dept. (1965).

The law of the State of New York does not differ from the federal law on the question of the tribunal competent to determine issues of substantive arbitrability. Both state

and federal law affirm that only the Court has jurisdiction to make such a determination. Petitioner's entire argument is based upon the spurious premise that such a difference exists. Since there is no difference, petitioner's entire argument falls, and with it any possible basis for the grant of certiorari in this case.

In an effort to tempt this Court to enter an area of irrelevant speculation, petitioner has profusely cited *Robert Lawrence Co.* v. *Devonshire Fabrics Inc., supra.* The Court once granted certiorari in the *Lawrence* case, but certiorari was dismissed by stipulation of the parties who entered into a settlement. If there were any similarity between the facts of the instant case and the *Lawrence* case, then perhaps certiorari would be appropriate. However, there is no similarity whatsoever between the cases. In fact, petitioner does not urge that there is a factual or legal similarity. In grasping at straws, petitioner points out that in the *Lawrence* case the Court of Appeals—obviously reacting to the arguments of the parties therein—specifically pointed out that its decision would have been different if state rather than federal law had been applied. This is irrelevant because the issues raised in this case are completely different from those raised in the *Lawrence* case. In effect the petitioner is saying: grant certiorari not for this case but for the sake of finally determining what might have been the decision in the *Lawrence* case. Such reasoning has never been the basis for the grant of certiorari by this Court.

Except for the petitioner's manufactured argument regarding the alleged conflict between state and federal law, it has not even attempted to relate its other objections to the requirements of Rule 19 of this Court. Absent from the decision of the Court of Appeals is any special circumstance which would warrant the grant of certiorari herein. That decision is supported by ample precedent: it neither conflicts with prior decisions of this Court or

any other Court, nor does it raise important new questions of federal law which should be determined by this Court. This petition must be denied because of failure of the petitioner to demonstrate the existence of any of the conditions which would justify the exercise of this Court's discretion in granting certiorari.

POINT II

The decision below is correct and appropriate.

On the basis of the specific facts of the instant case, petitioner argues that the Court of Appeals was in error in three respects. First, petitioner claims that it was improper for the Court rather than the arbitrators to determine whether the items submitted by petitioner for arbitration are within the scope of the arbitration agreement. Petitioner's misconception of the law, and the correctness of the decision of the Court of Appeals, has been demonstrated in Point I of this brief. The second and third objections of the petitioner relate to the procedure followed by the Court of Appeals and its final determination of the question of the arbitrability of specific items contained in petitioner's demand for arbitration. Those arguments are also without merit as will be demonstrated in detail.

A. The Court of Appeals properly determined whether the specific items were arbitrable rather than remand the case to the District Court for such determination.

Petitioner objects to the action of the Court of Appeals in not remanding to the District Court but ruling on the issues of the substantive arbitrability of each of the nine items tendered to arbitration by the petitioner. The Court gave as its reason for this action the fact that the issues were clear and that it wished to expedite the litigation (Pet. Supp. 30). There can be no question that the Court of Appeals had the power to make such a determination pur-

suant to 28 USC § 2106, which provides the mandate to the Court to:

> "... affirm, modify, vacate, set aside or reverse any judgment, decree, or order of the court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The action of the Court of Appeals was appropriate under the circumstances of the instant case. Before the Court were the affidavits prepared by petitioner which recounted in detail the facts and circumstances underlying each of the items it tendered to arbitration. Those affidavits provided the Court with sufficient information to conclude:

> "... the question of arbitrability seems so clear that no useful purpose would be served by leaving the question to be resolved by the District Court upon further proceedings, and in order to expedite this litigation we will rule on the arbitrability of each of the items...." (Pet. Supp. 30).

Petitioner now argues that the record before the Court of Appeals was too meagre to provide a basis for the determination of the issues of arbitrability. This position is in direct contradiction to petitioner's brief submitted to the Court of Appeals in which, at page 39, petitioner stated:

> "The demand is sufficient and in any event if the Court feels that further details should be given petitioner's affidavit supplies virtually a bill of particulars of each item in the demand.... It is apparent from the record and the applicable law that all of the disputes come within the broad ambit of the arbitration provisions."

It is inappropriate for petitioner to now argue to this Court that a record which it claimed was sufficient for a determination in its favor is too meagre for a determination against it.

B. The Court of Appeals properly determined that Item 8 of petitioner's demand for arbitration was not arbitrable under the agreement between the parties.

Petitioner objects to the determination by the Court of Appeals that Item 8 of petitioner's demand for arbitration was not arbitrable. Item 8 reads as follows:

> "8. Your failure to negotiate in good faith with us for an extension of the distributorship agreement between us and an accounting by you for all damages suffered or occasioned by us thereby." (Pet. Supp. 20.)

Item 8 was phrased by petitioner in a way calculated to misstate the language of the agreement between the parties. Petitioner's language creates the impression that respondent is required to renew petitioner's distributorship. The contract speaks clearly and unambiguously in completely different terms. It specifically states that six months before its expiration, both parties "shall examine the possibility" of executing a new agreement, and then goes on to state that upon the termination of the effective agreement there will be no "right accruing to either party to make any claim for damages or otherwise by reason of such termination."[2] (Pet. Supp. 5.)

Petitioner cannot by verbal tricks convert the examination of the possibility of executing a new agreement to a binding obligation to renew an agreement. Respondent had an absolute right not to renew petitioner's distributorship,

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[2] "3 (i) Six (6) months before the expiration of this agreement, that is, before June 30, 1962, Necchisew and Necchi S.p.A. of Pavia, shall examine the possibility of executing a new and, it is hoped long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined. In the event such an agreement is not reached, the present agreement will be terminated on December 31, 1962, without need of any advance notice and without any right accruing to either party to make any claim whatsoever for damages or otherwise, by reason of such termination."

which the parties never agreed to subject to arbitration. Nowhere in the agreement is there a provision for arbitration of a controversy based upon failure to extend. In fact, the parties have expressly waived their rights to make any claim for damages by reason of termination of the agreement. Under these circumstances, the Court of Appeals properly held that "in the light of the circumstances of this case and the language of the 1961 agreement, Item 8 is not arbitrable." (Pet. Supp. 33)

CONCLUSION

Petitioner has failed to demonstrate any reason for this Court to grant Certiorari or any error in the decision of the Court below. Certiorari should be denied.

Respectfully submitted,

DAVID A. BOTWINIK,
Attorney for Respondent,
63 Wall Street,
New York City.

FINK & PAVIA,
MURRAY MOGEL,
of Counsel.

APPENDIX 1

Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

For the Second Circuit

Necchi S.p.A.,
Plaintiff-Appellant,

against

Necchi Sewing Machine Sales Corp.,
Defendant-Appellee.

In the Matter of the Arbitration of Controversies, between
Necchi Sewing Machine Sales Corp.,
Petitioner-Appellee,

and

Necchi S.p.A.,
Respondent-Appellant.

Petition for Rehearing in Banc

Donovan Leisure Newton & Irvine,
New York, N. Y., for petitioner.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

Sterry R. Waterman,
Acting Chief Judge.

7 September 1965